Supreme Court, U.S.
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No. ___

In The Supreme Court of the United States

ABE SKINNER, AS COLLIER COUNTY (FL) PROPERTY APPRAISER,
Petitioner,

v.

MICRO DECISIONS, INC. A FLORIDA CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the Florida Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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July 21, 2005

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QUESTION PRESENTED

Whether a state court has jurisdiction to decide whether a person who has a copyright registration issued by the United States Copyright Office is entitled to the protection afforded by that copyright.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Florida Supreme Court.

The Petitioner here and Appellant below is Abe Skinner, as Collier County (FL) Property Appraiser.

The Appellee below and Respondent here is MicroDecisions, Inc., a Florida real estate information provider.

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The Florida Supreme Court decision to deny review is reported without opinion at 902 So. 2d 791 (Fla. April 22, 2005), and the Order denying review is reprinted in the Appendix to the Petition ("Pet. App.") at 2a. The Opinion of the Second District Court of Appeal, State of Florida, is reported at 889 So. 2d 871 (Fla. 2nd DCA 2004), and is reprinted at Pet. App. 9a-.

JURISDICTION

The Florida Supreme Court entered its judgment on April 22, 2005. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTES INVOLVED

This case involves provisions of the Copyright Act, 17 U.S.C. § 101, *et seq.*, 28 U.S.C. § 1338, and section 119.07, Florida Statutes.

STATEMENT OF THE CASE

This case represents an important turning point in the nature of copyright litigation in the United States. Resolution of the issues presented in this case will determine the continued significance of both the Copyright Act and 28 U.S.C. § 1338. Florida's Second District Court of Appeal has extended state court jurisdiction to a question which has always been within the exclusive province of the Federal courts: who may claim entitlement to copyright protection?

Petitioner Abe Skinner, as Collier County (FL) Property Appraiser, produces tax maps by use of a computerized Geographic Information System ("GIS") which allows users to graphically display information about properties in Collier County, Florida. He produces this data at great expense to county taxpayers. To protect the investment in the GIS data, he applied for and received a

Certificate of Registration from the United States Copyright Office, Number Vau598-175, effective September 03, 2002. In addition to posting the maps on his office website for anyone to view for free, Petitioner completely complied with Florida's Public Records Laws by providing one copy of the GIS tax map source code to anyone requesting it, upon payment of the actual cost of reproduction, along with a personal use license that allowed the recipient of the code to do anything with it except use it for commercial purposes.

Respondent, MicroDecisions, Inc., is a Florida for-profit corporation that provides real estate information to subscribers. MicroDecisions represents a new breed of entrepreneur that requests public records direct from government computers, and then resells those records at great expense to subscribers who could otherwise access the same records for free on Petitioner's web site, or for the cost of reproduction directly from the Petitioner.

A. Factual Background

Respondent requested copies of the GIS tax map source code from Petitioner. Petitioner replied that his office provides a license agreement with copies of GIS tax maps that permits personal use of the records, and provides a commercial use license that allows transfer and sale of the maps, and quoted the prices of the data both for the personal use and commercial use licenses.

Prior to receipt of any payment, and prior to being served with the Complaint in the Circuit Court, Petitioner sent a CD-ROM containing the GIS tax map files to Plaintiff, with an invoice for the actual cost of reproduction. Respondent paid the invoice.

B. Proceedings Below

Under the guise of seeking copies of public records (which Respondent already possessed), Respondent served its Complaint in the Circuit Court of the Twentieth Circuit of Florida, seeking an alternative writ of mandamus compelling Petitioner to provide the source code free from copyright restrictions. Respondent claimed that the copyright registration effectively denied it access to the public records already in its possession, because it did not want to be subject to a personal use license.

Petitioner served his Answer and Defenses, asserting that the case was moot because Respondent was furnished with the GIS tax map files (prior to the payment of the fee prescribed by law), that Respondent had unclean hands because it failed to submit the fee for the actual cost of reproducing the records, that the circuit court lacked subject matter jurisdiction because what Respondent sought was really a determination of who may claim entitlement to a copyright, and failure to state a cause of action.

Petitioner removed the case to the U.S. District Court asserting that the predominant issue in the action is a matter within the exclusive jurisdiction of the federal courts, arising under an Act of Congress relating to copyrights. Respondent moved to remand the case to the circuit. The District Court granted the Motion to Remand, noting that the Complaint filed in the circuit court alleged that the documents are public records to which the Property Appraiser must allow access, that the claim as alleged in the Complaint did not arise from federal law or the Copyright Act, and was therefore not completely preempted by federal law. A copy of the Order is included in the Appendix hereto at Pet.App. 4a.

It is important to note that the District Court based its decision to remand the case upon the four corners of the Complaint, and not upon the various affidavits and

memorandae supporting each side's Motion for Summary Judgment filed once the case was remanded to state court. The Second District Court of Appeal misconstrued this distinction.

The circuit court determined that Respondent's claim of denial of access to public records was moot because Petitioner had already furnished the requested records, and that it lacked jurisdiction to determine whether Petitioner may properly claim copyright protection for works in his office, because that is a question of federal law.

Respondent timely appealed the circuit court's decision to Florida's Second District Court of Appeal, a state court of intermediate jurisdiction. The Second District reversed the trial court, holding that Petitioner "has no authority to assert copyright protection in the GIS maps, which are public records." *MicroDecisions, Inc. v. Skinner*, 889 So. 2d 871, 874 (Fla. 2nd DCA 2004).

REASONS FOR GRANTING THE PETITION

This case presents an important jurisdictional issue, because it represents the first time that a state court has ignored 28 U.S.C. § 1338 to determine for itself that someone was improvidently granted a Certificate of Registration from the U.S. Copyright Office and that a public official of the State of Florida may not lawfully hold a copyright. Entitlement of public bodies to copyright protection may be dictated by state law, as suggested in *Bldg. Officials & Code Adm'rs v. Code Tech, Inc*, 628 F.2d 730, 735-36 (1st Cir. 1980), but the application of such law has heretofore been made exclusively by federal courts, pursuant to 28 U.S.C. § 1338.

The Second District Court of Appeal also notes the conflict between its decision and a decision of the Second

Circuit Court of Appeals, *County of Suffolk, N.Y. v. First American Real Estate Solutions*, 261 F.3d 179 (2d Cir.2001) ("*First American*"). *First American* dealt with the precise subject matter at issue in this case, whether a copyright held by a public body for GIS source code operated as a restriction of access to public records. The Second Circuit held that Suffolk County's copyright did not operate as a denial of access, because the information provider in that case possessed the GIS source code at issue through a request made under the New York Freedom of Information Law (FOIL)), as does the Respondent in this case. *First American*, 261 F.3d at 191-92. Rather, the court held that the copyright only restricted the subsequent sale of the records. In this case, the Second District Court of Appeal of Florida makes no effort to explain the different results despite seemingly similar public records laws, except to note that New York law is not Florida law. *MicroDecisions v. Skinner*, 889 So. 2d at 876.

I. THIS CASE RAISES THE CRITICALLY IMPORTANT QUESTION OF WHETHER A STATE COURT CAN DECIDE WHO IS ENTITLED TO HOLD A COPYRIGHT.

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." 28 U.S.C. § 1338(a).

Title 17 United States Code, section 301(a), provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright . . . are governed exclusively by this title."

Respondent can point to the Complaint and the Order Remanding the case from the District Court, based solely on the Complaint, and claim that the case is about public records, but the true nature of this case is evident in the Second District's own words in its holding: **"We hold that Skinner has no authority to assert copyright protection in the GIS maps, which are public records."** *MicroDecisions*, 889 So. 2d at 874 (Emphasis supplied). In so holding, the Second District misconstrued the law controlling its jurisdiction.

A. The Second District Court of Appeal Misconstrued the Significance of the United States District Court's Order on Remand.

The Second District incorrectly reversed the Circuit Court's decision on the basis of the order of remand from the United States District Court for the Middle District of Florida, *MicroDecisions v. Skinner*, No. 2:02-cv-639-FTM-29DNF (M.D. Fla. Feb. 5, 2003). The District Court based its decision to remand solely on the allegations in the Complaint. *See* Remand Order at 3. The Remand Order notes that "[t]he well-pleaded complaint in this case alleges that the documents are public records to which the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular, and they do not satisfy the test articulated by the Eleventh Circuit." *Id.* at 4 (citations omitted). Had the District Court been favored with the information before the Second District Court of Appeal, the District Court may well have seen exactly what the Plaintiff's real issue in the case actually is: whether a Florida constitutional officer has the authority to hold a copyright.

The District Court could not consider that Respondent withheld payment of the fee for the requested GIS data files, in order to bring this as a public records case, as alleged in the Answer and demonstrated by the Affidavits. The District Court could not consider the undisputed fact that the public records at issue have already been provided, as the Answer and Affidavits demonstrated. Therefore, the District Court did not consider the fact that the public records claim was moot, concluding "that the Copyright Act does not completely preempt the state law public records access claims in the Complaint." Remand Order at 4-5.

When acting on the cross-motions for summary judgment the Circuit Court was presented with considerably more information than the allegations in the Complaint. The Answer alleges and Affidavits demonstrated that any state law public records claims in this case were brought with unclean hands, and are now moot, because the records have been provided. The sole remaining issue in this case was Petitioner's authority to claim copyright protection. No state court has ever decided this issue, and with good reason: state courts lack jurisdiction to determine issues of federal copyright law. *See* 28 U.S.C. § 1338.

The *First American* decision certainly does not hold that a state court can decide whether a state or its subdivisions have authority to claim copyright. The court in *First American* examined the authority of a state and its subdivisions to claim copyright protection. *Suffolk* County, 261 F.3d at 187. The court decided that a state and its subdivisions did have authority to claim copyright protection for GIS tax maps. *Id.* The court determined that such authority arose from the Copyright Act. *Id.* The *First American* Court then decided whether a state law abrogated the county's rights under the Copyright Act. *First American*, 261 F.3d at 188-189. The Second Circuit decided that FOIL did not abrogate the county's copyright protection. *Id.* It

certainly did not hold that the issue could have been decided by a New York state court. Indeed it could not have been so decided, because federal courts have exclusive jurisdiction to decide matters of copyright. Nothing in Florida law holds that a constitutional officer may not hold a copyright. *See also State of Wisconsin v. Law Office Information Systems, Inc.*, 230 Wis. 2d 185, 603 N.W. 2d 748, 1999 Copr.L.Dec. P 27, 947, 1999 WL 649235, page 4 (Wis. App. Table 1999)(noting that state laws promoting openness in government were not relevant to whether a copyright exists, and that the existence of a copyright was a matter of federal law). The same holds true in the present case.

Nevertheless, the Second District Court of Appeal based its analysis of the jurisdictional issues upon the Order of Remand from the United States District Court, and disregarded those portions of the record that demonstrated that what Respondent really sought was to have a court declare that Petitioner was not entitled to hold the Certificate of Registration duly issued by the Register of Copyrights of the United States of America. This misapplication is salient to this Court's review of the question presented because this is what allowed the Second District to misconstrue the law controlling its jurisdiction.

B. The Second District Court of Appeal Misconstrued the Law Controlling Jurisdiction of this Case.

At the heart of Respondent's case is its challenge to Petitioner's authority to hold a copyright in the GIS source code. Aside from the explicit holding of the Second District, addressing that very issue, examine the nature of the case in the absence of either of the Respondent's two claims, the public records claim or the copyright challenge. If one removes the public records claim from the case, one could still challenge the authority of a public official to claim

copyright protection, but remove the copyright challenge from the case, and the case is moot because the Respondent already possesses the requested records.

The Second District's misplaced focus caused it to misconstrue the law controlling its jurisdiction to decide the essential element in this case. Despite the fact that the Respondent already possessed the requested GIS map code, and that the public records claim was therefore moot pursuant to *Mazer v. Orange County*, 811 So. 2d 857, 859 (Fla. 5th DCA 2002) (holding that a public records claim is moot, save for the issue of attorney's fees, once the requested records are provided), the court proceeded to exercise jurisdiction over what it deemed a public records case, before holding that Petitioner could not hold a copyright registration. *MicroDecisions*, 889 So. 2d at 874.

Indeed, as the Second District notes, not all cases involving copyright are preempted. "Only those causes of action that involve rights equivalent to those protected by the act are preempted." *Garrido v. Burger King Corp.*, 558 So. 2d 79, 82 (Fla. 3rd DCA 1990). Section 106 of the Copyright Act states that the rights within the general scope of copyright are those which prohibit reproduction, performance, distribution or display of a work. 17 U.S.C. § 106; 1 NIMMER ON COPYRIGHT § 1.01[B] at 1-11 (1987).

In *Pincus v. Carlisle*, 585 So. 2d 1172 (Fla. 4th DCA 1991), the district court granted a writ of prohibition with directions to strike a count in a complaint that involved rights equivalent to those protected by federal patent and copyright law, and quashed the trial court's temporary injunction involving copyright issues. The district court held that the fundamental nature of the claim involved copyright, and was therefore within the exclusive jurisdiction of the federal district courts. *Id.* Similarly, in *Sparta Surf, Inc. v.*

Korda, 599 So. 2d 242, 243 (Fla. 4th DCA 1992), the district court granted a writ of prohibition because "the essence of the complaint . . . is a claim of copyright. . . ." The court noted that "[t]he fact that the complaint also attached a copy of a trademark application and filing receipt does not change what the actual pleadings allege, which is a copyright law, not a trademark claim." *Id. See also Schachel v. Closet Concepts, Inc.*, 405 So. 2d 487, 488 (Fla. 3rd DCA 1981)("if the suit is founded on a breach of a right created by the patent laws, even if that right is confirmed by separate agreement, the case arises under the patent laws, and a state court is without subject matter jurisdiction.")

Citing *Department of Health & Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377 (Fla. 1st DCA 1994), the Second District claims that Florida law supports its jurisdiction over the copyright issues in this case. The Second District notes that:

> In that case, the pharmacy filed a petition for writ of mandamus seeking documents pursuant to Florida's public records law, section 119.07, Florida Statutes. As in this case, the complaint did not allege a cause of action under the federal copyright law, but the public entity defended on the ground that the documents were copyrighted. The *Southpointe* court held that under the federal well-pleaded complaint rule a copyright *defense* does not defeat state court jurisdiction.

MicroDecisions, 889 So. 2d at 874. The Second District fundamentally misconstrues *Southpointe*. The public entity in *Southpointe* had not provided the requested transcripts, so the public records claim was not moot. Similarly, the public entity was not asserting its own copyright of the material as a

defense, it was claiming that the court reporter's copyright of the transcripts prevented it from making copies for requesting parties. Using the factual scenario from *Southpointe*, if one removes the copyright elements of the case, there is still a ripe public records claim remaining, but if one removes the public records claim, the case would be moot because nobody ever questioned the right of the court reporter to copyright her work. *Southpointe* was indeed a public records case. The present case is not.

Congress has provided with admirable simplicity and clear expression that ownership of a copyright vests in its creator. 17 U.S.C. 201(a). Congress has thus pre-empted a State's ability to enact a law, for example, declaring that no member of a particular group may hold a copyright.

The Second District Court of Appeal misconstrues a state government's ability to contract with its employees regarding ownership of the employees' creations (such as the Taxol patent held by Florida State University or the Gatorade patent held by the University of Florida) or by state law to determine who is or is not an employee, incorrectly holding that works are left available for copyright protection by the state or the individual author, "depending on state law and policy, and subject to the exceptions dictated by public policy...." *MicroDecisions*, 889 So. 2d at 874-75 (citing *Code Tech*, 628 F.2d at 735-36; *First American*, 261 F.3d at 188.)

The Second District, noting, "Florida law determines whether Skinner may claim a copyright in his office's creations," makes the giant leap to assume that Florida courts are vested with jurisdiction to decide whether the holder of a Certificate of Registration may lawfully hold it. *Id.* at 875.

This is precisely where the Second District goes astray. States may well have the authority to determine who among their government may claim entitlement to copyright protection for their works, which Florida has not done, but that does not grant a state court jurisdiction to decide who is entitled to hold a copyright. That explains the dearth of case law from any state court, decide the issue of who has authority to hold a copyright, as the Second District did in this case.

C. The Second District Incorrectly Determined that Florida's Public Records Law Abrogates the Copyright Act.

Nothing in the Florida Public Records Law, Chapter 119, Florida Statutes, states which public official may or may not hold a copyright. The Second District Court of Appeal notes that "[t]he Florida public records law . . . requires State and local agencies to make their records available to the public for the cost of reproduction. This mandate overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption." *Id.* at 876 (citing § 119.07(1)(a), Fla. Stat.; Art. I, § 24, Fla. Const.) The Second District Court of Appeal thus misconstrues states' powers of abrogation as applied to copyright cases.

"It is evident that the congressional intent in § 106 was to protect the rights of copyright holders. . . ." *Foley v. Luster*, 249 F.3d 1281, 1287 (11th Cir. 2001). "Under Article VI of the U.S. Constitution, federal law is the 'supreme Law of the Land,' and any state law that is in conflict with a federal law is preempted." *Id.* at 1286. In *Sears, Roebuck and Co. v. Stiffel Company*, 376 U.S. 225, 84 S.Ct. 784 (1964), this Court held that federal copyright laws

> like other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. *See Sperry v. Florida*, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963). When state law touches upon the area of these federal statutes, it is 'familiar doctrine' that the federal policy 'may not be set at naught, or its benefits denied' by the state law. *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 172, 173, 176, 63 S.Ct. 172, 173, 87 L.Ed. 165 (1942). This is true, of course, even if the state law is enacted in the exercise of otherwise undoubted state power.

Article VI, Clause 2, of the United States Constitution provides that when a state law conflicts with a federal law, the federal law must prevail. Federal law may preempt state law in three ways: 1) explicit preemption; 2) conflict preemption; and 3) field preemption. *Foley*, 249 F.3d at 1286-1289.

Explicit preemption occurs "when 'Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" *Id.* at 1286-87 (citing *Jones v. Ruth Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977)). "Section 301 explicitly preempts all claims that are covered under § 106 of the Act, if they come within the subject matter of §§ 102 and 103. These include violations of the following rights: . . . (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . ." *Id.* at 1287.

"Conflict preemption 'arises when compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the

accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 1287 (citing *Pacific Gas and Elec. Co. v. State Energy Res. Conservation and Dev. Comm'n*, 461 U.S. 190, 204, 103 S.Ct. 1713, 1722, 75 L.Ed.2d 752 (1983). This may occur when it is impossible to comply with both federal and state statutes or regulations or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed.2d 581 (1991).

Article I, Section 8, Clause 8 of the United States Constitution grants Congress the power to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries". Pursuant to that authority, Congress enacted the federal Copyright Act.

Section 301 of the Copyright Act which is entitled "Preemption with respect to other laws", specifically provides that:

> On or after January 1, 1978, all legal and equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by Sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

17 U.S.C. §301(a). This section has been held to be an express preemption provision. *Foley*, 249 F.3d at 1287, *Roth v. Pritkin*, 710 F.2d 934, 938 (2d Cir. 1983), cert. denied, 464 U.S. 961, 104 S.Ct. 394, 78 L.Ed.2d 337 (1983); *Association of American Medical Colleges v. Carey*, 728 F.Supp. 873 (N.D.N.Y. 1990).

Because the Second District Court of Appeal held that the Florida Public Records Law vitiates Petitioner's rights as granted by the Copyright Act, express preemption applies. *See Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377 (3d Cir. 1999) (a Pennsylvania statute banning exclusivity of film exhibitions after forty-two days of showing of the film was preempted by the Copyright Act.); *Ehat v. Tanner*, 780 F.2d 876, 878 (10th Cir. 1985) (state common law protections of copyright holders' work were preempted). *Richard Feiner & Co. v. H.R. Industries, Inc.*, 10 F.Supp. 2d, 310 (S.D.N.Y. 1998) (Section 301 of the Copyright Act provides for preemption of all state claims that are tantamount to those falling within the scope and subject matter of Copyright Law).

In addition to express preemption, conflict preemption also applies because the Second District's holding is an interpretation of Public Records Law that conflicts with the federal Copyright Act. Petitioner has an exclusive right pursuant to Section 106 of the Copyright Act (17 U.S.C. §106) to distribute Collier County's GIS tax maps. This copyright grants Petitioner the right to refuse to allow another entity to distribute the maps. The Second District's interpretation of the Public Records Laws abrogates Petitioner's exclusive right to distribute the copyrighted GIS tax maps produced by his office.

In *Association of American Medical Colleges v. Carey*, 728 F.Supp. 873 (N.D.N.Y. 1990), an educational association which held copyrights to its medical school

admissions tests, brought an action challenging the disclosure requirements of New York State's Standardized Testing Act. The Association moved for summary judgment, claiming that the portions of the state statute which required disclosure of the copyrighted tests were preempted by the Copyright Act of 1976. The college argued that conflict preemption was the legal basis for its claim. The state argued that the statute codified the 'fair use' exception and the archiving exception contained within the Copyright Act.

The district court stated in pertinent part that the "express preemption provision of 17 U.S.C. §301, which through its terms and the legislative history surrounding its enactment, 'makes clear a congressional intent to preempt previous law and replace the labyrinth of statutory and common law authority with a single, generally applicable federal statute.'" *Association of American Medical Colleges*, supra, 728 F.Supp. at 876, quoting from *Roth v. Pritkin, supra*. The court referred to decisions in other circuits and held that it was clear that "a state may neither abrogate nor in any way diminish the federally granted and protected rights of a copyright holder." Id. at 874, citing *Mills Music, Inc. v. Arizona*, 591 F.2d 1278, 1285 (9th Cir. 1979); *Bell v. Combined Registry Co.*, 397 F.Supp. 1241, 1245 (N.D.Ill. 1975), aff'd. 536 F.2d 164 (7th Cir.), cert. denied, 429 U.S. 1001, 97 S.Ct. 530, 50 L.Ed.2d 612 (1976).

Plaintiff in *Association of American Medical Colleges, supra*, claimed conflict preemption. In *Association of American Medical Colleges*, the plaintiff argued that the New York statute denied it the benefits it was entitled under Section 106 of the Copyright Act (17 U.S.C. §106 The district court rejected defendant's fair use and archiving defenses and held that the disclosure provisions of the state statute were preempted due to direct conflict with the federal Copyright Law. *American Association of Medical Colleges,*

supra.). The Second District's interpretation of the Florida Public Records Law operates to deny Petitioner benefits conferred upon his office by the same provision.

On appeal, the Second Circuit Court of Appeals reaffirmed the fact that if the state statute facilitates infringement, it conflicts with the federal Copyright Act and is preempted. *Association of American Medical Colleges v. Cuomo*, 928 F.2d 519, 523 (2d Cir. 1991), cert. denied, 502 U.S. 862, 112 S.Ct. 184, 116 L.Ed.2d 146. The Second Circuit reversed and remanded for further factual determinations concerning 'fair use' exception issues and continued the injunction of enforcement of the state statute. 928 F.2d at 526.

In the instant case the plain language of Florida's Public Records Laws do not create any conflict with the Copyright Act. The Florida Public Records Law requires that Petitioner provide access to his office's records, and he has always provided public access to the copyrighted tax maps and the source code from which they are printed, whether that be accomplished in person, via the Internet, or by mail. The licenses with the source code and maps contain copyright warnings with regard to further dissemination without a license. Petitioner is in full compliance with Public Records Law. The Public Records Law by its unambiguous terms does not facilitate copyright infringement.

The Second District erroneously expands Florida's Public Records Law to facilitate copyright infringement in this case. As a result of its decision, Respondent is free to ignore Petitioner's Certificate of Copyright and reproduce and sell Petitioner's maps. The Second District has clearly violated the Supremacy Clause. The court did so by disregarding the one case that has reviewed the precise

issues surrounding the exact same subject matter as in this case, *First American, supra.*

II. THE SECOND DISTRICT'S DECISION, AND THE FLORIDA SUPREME COURT'S REFUSAL TO REVIEW THE CASE RESULTS IN CONFLICT BETWEEN A FLORIDA STATE COURTS AND THE SECOND CIRCUIT COURT OF APPEALS OVER THE VERY SAME ISSUE.

First American, supra, is the only other case in the nation addressing the issue of government authority to copyright GIS source code and tax maps. Although case law from the Federal Second Circuit Court of Appeals is only persuasive to a case in state court in Florida, inasmuch as the subject matter in that case is identical to the present case, and the real estate information vendor in that case made the exact same argument being made in the present case, to wit, that the state Public Records Law abrogates the governing body's copyright, the case should have been reviewed very closely indeed.

In *First American*, the County brought suit under the Copyright Act, 17 U.S.C. § 101 *et. seq.*, against First American (and assorted other companies acquired by First American)("information vendors"), alleging that First American infringed its copyrights in its GIS tax maps by publishing and marketing those maps without Suffolk County's permission. *First American*, 261 F.3d at 183. The information vendors moved to dismiss for failure to state a claim, arguing that the County had no authority to assert a copyright in its tax maps. *Id.* The information vendors argued that New York's public records law, the Freedom of Information Law ("FOIL") abrogated the County's copyright, leaving the County without authority to seek

copyright protection for its tax maps. *See* N.Y. Pub. Off. Law § 84 *et seq.* (McKinney Supp. 2001).

The Second Circuit answered the question of whether the New York Legislature intended to or indeed, could abrogate a covered entity's copyright when it enacted FOIL, in the negative. *Id.* at 188.

> FOIL provides only that '[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records,' subject to certain exceptions that are not relevant here. N.Y. Pub. Off. Law § 87(2) (McKinney Supp. 2001); *see also id.* § 89(3) (McKinney Supp. 2001) (requiring each entity subject to FOIL to provide the person requesting the record access or a written denial of access, and for those records to which it provides access, to provide, upon payment of a fee, a copy of the record to the requester). FOIL is silent as to the existence of, and the effect of requiring disclosure on, any preexisting copyright the state agency may possess. FOIL is also silent as to what may occur after a state agency discloses its records. . . . By the statute's plain language, the extent of the state agency's obligation is to make its records available for public inspection and copying. **It is one thing to read this provision to permit a member of the public to copy a public record, but it is quite another to read into it the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute.**

Id. at 188-89 (emphasis added). Like Respondent in this case, the information vendors in Suffolk County who include amicii in the Second District Court of Appeal, trumpeted the policies favoring broad access to governmental documents and the presumption of openness inherent in the state's Public Records Law. *Id.* The court rejected the broad policy argument because it

> require[d] a degree of inference that fails to overcome the limited scope of the obligations dictated by the plain language of the act--that a state agency must make its records available for public inspection. Moreover First American ignores the fact that the free press or an individual seeking to use the state agency records to educate others or to criticize the state or the state agency may be protected by the Copyright Act's fair use doctrine.

Id. at 189. (*citing* 17 U.S.C. § 107; *On Davis v. The Gap, Inc.*, 246 F.3d 152, 173-76 (2d Cir. 2001).

The Second Circuit Court of Appeals was very clear in its decision: the County could maintain its copyright protections in the GIS tax maps, while complying with its obligations under FOIL. *First American*, 261 F.3d at 191-92. Like the Petitioner in the present case, Suffolk County was not trying to restrict *initial access*, but was attempting to restrict only the *subsequent redistribution* of its copyrighted works. *Id.* The Second Circuit found "nothing inconsistent between fulfilling FOIL's goal of access and permitting a state agency to place reasonable restrictions on the redistribution of its copyrighted works." *Id.* "For example, an agency's choice to notify the recipient that a portion of the record is protected by copyright law or an agency's requirement that the recipient enter into a licensing

agreement if it wishes to distribute the record commercially does not restrict *initial access* but only what the recipient may do once it acquires access." *Id.* (Emphasis added).

Although the information vendors in *First American* did not withhold the fee prescribed by law, in order to cultivate the case as a public records case, the same rationale holds true in the present case. Strikingly similar to Florida's Public Records Act, FOIL guarantees the right to inspect and copy public records, and to receive a copy of the record upon payment of the fee prescribed by law. N.Y. Pub. Off. Law §§ 87(2), 89(3) (McKinney Supp. 2001). While the information vendors in *First American* were guaranteed the right to copy, copy and copy again, the Second Circuit held in no uncertain terms that this did not translate into the right to sell, sell, and sell again, that which it would be unable to sell under copyright law. *First American*, 261 F.3d at 189.

Respondent and *Amicii* argued to the Second District Court of Appeal that the Second Circuit utilized a narrow interpretation of FOIL to which New York courts might not subscribe. The Second District's interpretation of the Florida Public Records Law operates to deny Petitioner benefits conferred upon his office by the same provision. Although the Second Circuit indeed chose not to add words to the statute as sought by the information vendor in that case, the court hardly applied an interpretation of FOIL any more narrow than a state court would apply. The Second Circuit noted that because the Copyright Act only precludes the United States government from owning copyrights, states and their subdivisions can own copyrights. *First American*,

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[1] *Citing Bldg. Officials & Code Adm. v. Code Tech., Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980)("Works of state governments are therefore left available for copyright protection by the state or the individual author. . . ."); *Nat'l Conf. of Bar Exam'rs v. Multistate Legal Studies, Inc.*, 495 F.Supp. 34, 35 (N.D. Ill. 1980); *aff'd* 692 F.2d 478 (7th Cir. 1982); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[A], at 5-81 n.1 (2001). The Second District Court

261 F.3d at 187. The court notes that "although a state and its subdivisions may own a copyright as a matter of copyright law, it may be that Suffolk County is not permitted to do so in this instance. The question becomes whether New York's Legislature, by enacting FOIL, has ceded Suffolk County's copyright." *Id.* at 188. In deciding that FOIL did not abrogate the county's copyright, the court noted that the plain language of FOIL [like Florida's Constitutional and statutory Public Records Law] guaranteed the right to access to and copy public records. *Id.* The court's reluctance "to read into [FOIL] the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute," is a court merely following the language of the statute. *Id.* at 189.

The Second District had no such reluctance to add words to Florida's statutory and constitutional public records provisions. While noting that state and local agencies are required to make records available to the public for the cost or reproduction, the court continues by finding that these requirements override a governmental agency's ability to claim a copyright in its work. *MicroDecisions*, 889 So. 2d at 876.

First American bears yet another striking similarity to the present case. In each case, an advisory opinion was sought and received during the pendency of the action. *See County of Suffolk v. Experian Information Solutions, Inc.*, 2000 WL 1010262 (S.D.N.Y.) (granting the information vendor's Motion for Reconsideration based upon the

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of Appeals copyrights its web page, <http://www.2dca.org/index.htm>, the authority for which comes from the Copyright Act. Based upon MICRODECISIONS' theory that the Public Records Laws abrogate the Copyright Act, that Court would be susceptible to suit under the Public Records Act were it to seek to license commercial use of the public records on its web site.

advisory opinion rendered prior to the expiration of the period for rehearing and granting the vendor's Motion to Dismiss)(vacated by *First American*). The window of time for reconsideration of the trial court's ruling in this case ran before the information provider could get anyone to request an advisory opinion from the Attorney General, so the Florida Attorney General's opinion came before the Second District Court of Appeal in the first instance, rather than the trial court. Nevertheless, the opinions in both cases are advisory, not binding[3], and both suffer from the same flaw: they add the right to commercially distribute records to the respective Public Records Laws in each case. Both opinions incorrectly assume that the respective States have the power to abrogate federal copyright law, and that they did so abrogate the copyrights involved.[4] Like the court did in *First American*, this Court should find that the Attorney General's September 3, 2003 opinion regarding copyrighting GIS source code and tax maps does not accurately state Federal law.

Florida's citizens reserved only the right "to inspect or copy any public record." Art. I, § 24, Fla. Const. Section 119.07(1)(a), Florida Statutes, guarantees inspection and examination of records, and guarantees that citizens will be furnished with copies of public records upon payment of the fee prescribed by law. These together guarantee the exact same right of access to public records that FOIL does. Florida's Constitutional Public Records Laws, like FOIL,

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[3] *Leadership Housing, Inc. v. Department of Revenue*, 336 So. 2d 1239 (Fla. 4th DCA 1976).

[4] Interestingly, the Florida Attorney General remembered the Supremacy Clause in his June 6, 2003 opinion involving copyrights and public records, *Op. Fla. Atty. Gen.* 2003-26, forgotten before rendering the September 3, 2003 AGO regarding copyrighting GIS tax maps, *Op. Fla. Atty. Gen.* 2003-42.

guarantee no right to re-sell those same records commercially.

Respondent's suggestion that a New York state court might apply a less narrow construction of the law than the Second Circuit applied in *First American* proved to be remarkably prescient in the present case, given the eagerness with which the state court added unwritten guarantees to Florida's Public Records Law. This underscores the importance of state courts respecting the jurisdictional constraints put in place in the U.S. Code regarding copyright.

CONCLUSION

The petition for a writ of certiorari should be granted.

Skinner v. MicroDecisions, Inc.
2005 WL 623446, 902 So.2d 791 (Table) Fla. 2005.

Supreme Court of Florida.

Friday, April 22, 2005
CASE NO. SC05-255

Lower Tribunal No.: 2D03-3346

Abe Skinner, etc., Petitioner(s)
vs.
MicroDecisions, Inc., Respondent(s)

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

The motion for attorney's fees is granted and it is ordered that respondent shall recover from petitioner the amount of $2,500.00 for the services of respondent's attorney in this Court.

PARIENTE, C.J. and WELLS, ANSTEAD, LEWIS and QUINCE, JJ. Concur.

Appeal From: 2nd DCA, 889 So.2d 871
Disposition: Rev.den.

MICRODECISIONS, INC., Appellant, v. ABE SKINNER, as Collier County Property Appraiser, Appellee.

Case No. 2D03-3346

COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

889 So. 2d 871;2004 Fla. App. LEXIS 18167;Copy. L. Rep. (CCH) P28,910;73 U.S.P.Q.2D (BNA) 1533;29 Fla. L. Weekly D 2685

December 1, 2004, Opinion Filed

SUBSEQUENT HISTORY: Released for Publication January 28, 2005. Review denied by, Motion granted by Microdecisions, Inc. v. Skinner, 2005 Fla. App. LEXIS 1861 (Fla. Dist. Ct. App. 2d Dist., Jan. 10, 2005)
Review denied by Skinner v. Microdecisions, Inc., 2005 Fla. LEXIS 1034 (Fla., Apr. 22, 2005)

PRIOR HISTORY: [*1] Appeal from the Circuit Court for Collier County; Ted H. Brousseau, Judge.

Microdecisions, Inc. v. Skinner, 2003 U.S. Dist. LEXIS 14846 (M.D. Fla., Feb. 5, 2003)

COUNSEL: Jonathan D. Kaney, Jr., Jonathan D. Kaney, III, and Heather Bond Vargas of Cobb & Cole, Daytona Beach, for Appellant.

Gaylord A. Wood and J. Christopher Woolsey of Wood & Stuart, P.A., Fort Lauderdale, for Appellee.

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Robert M. Dees of Milam & Howard, P.A., Jacksonville, for Amici Curiae, First Amendment Foundation and the Florida

Society of Newspaper Editors.

Lawrence P. Zolot, Hollywood; and Paul Bender, Christopher A. Mohr, and Michael R. Klipper of Meyer & Klipper, PLLC, Washington, D.C., for Amici Curiae, LexisNexis; West; National Background Data, L.L.C.; The National Association of Professional Background Screeners; The Center for Information Policy [*2] Leadership; OpenOnline, L.L.C.; Public Record Retrieval Network; Choice Point, Inc.; Seisint, Inc.; and the Software & Information Industry Association.

JUDGES: NORTHCUTT, Judge. STRINGER and DAVIS, JJ., Concur.

OPINION BY: NORTHCUTT

OPINION: NORTHCUTT, Judge.

The issue before us is whether a county property appraiser may require prospective commercial users of the records created in his office to first enter into a licensing agreement. We conclude that he may not. For this reason, we reverse the summary judgment in favor of Abe Skinner, the Collier County Property Appraiser, and remand with directions to enter judgment for Microdecisions, Inc.

The facts in this case are uncontested. Microdecisions compiles data concerning real estate in south Florida, then sells this product on its website. Its customers can pay to retrieve plats, maps, and information about property values and mortgage encumbrances, among other things. With this purpose in mind, Microdecisions sought copies of Geographic Information Systems (GIS) maps that Skinner created in the course of his official duties. No one disputes that the GIS maps are public records, n1 but Skinner claimed they were copyrighted under federal law. [*3] He refused to permit Microdecisions' unfettered use of the maps unless it agreed to a licensing agreement that required a royalty payment if the maps were used commercially.

Microdecisions filed a petition for writ of mandamus and a declaratory judgment action in circuit court, seeking to compel Skinner to provide the public records unencumbered by the licensing agreement. Skinner filed affirmative defenses, and eventually both parties moved for summary judgment.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Section 119.011(1), Florida Statutes (2002), defines "public records" as:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency. In turn, section 119.011(2) defines an "agency" as any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . . .

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - [*4]

We review a summary judgment de novo. Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130 (Fla. 2000). The circuit court based its decision to grant Skinner's summary judgment motion on two of his affirmative defenses. The court's first ground was that Microdecisions' claim under Florida's public records laws was moot. Skinner maintained that after the lawsuit was filed, he sent Microdecisions a set of CD-ROM discs containing the maps. Thus, he argued, Microdecisions' claim was moot because the company had been given the public records. But the maps were transmitted with a letter that enclosed "a copy of the

Personal Use License Agreement that does not permit commercial use of the data in any manner." The license agreement purported to bind the user if the discs were used. Microdecisions was unwilling to agree to the restriction. A case is moot only "when the controversy has been so fully resolved that a judicial determination can have no actual effect." Montgomery v. Dep't of Health & Rehabilitative Servs., 468 So. 2d 1014, 1016 (Fla. 1985). Here, Microdecisions sought unconditional access to the public records, including the right [*5] to use the records in its business, but Skinner delivered the GIS maps on the condition that they were for personal use only. Therefore, the controversy concerning whether Skinner can validly impose this restriction on the use of the maps remained at issue. The circuit court erred as a matter of law in finding that the public records claim was moot. See WFTV, Inc. v. Robbins, 625 So. 2d 941, 943 (Fla. 4th DCA 1993) (reversing the denial of a petition for writ of mandamus as moot when the issues presented were still live and the parties had a legally cognizable interest in the outcome).

The circuit court's second basis for the summary judgment was that the case involved a copyright issue that should be decided by a federal court. Skinner's affirmative defenses claimed that Microdecisions' legal actions were actually an attempt to litigate his right to copyright the maps and that federal courts had exclusive jurisdiction over copyright actions under 28 U.S.C. § 1331. Early in the suit, Skinner filed a notice of removal to the United States District Court for the Middle District of Florida, again contending that the federal court had exclusive [*6] jurisdiction. But that court remanded the case to state court. The order of remand pointed out that the presence or absence of federal question jurisdiction is governed by the "well-pleaded complaint" rule. See Rivet v. Regions Bank of La., 522 U.S. 470, 474-75, 139 L. Ed. 2d 912, 118 S. Ct. 921 (1998). The district court noted:

> The well-pleaded complaint in this case alleges that the documents are public records to which the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular, and they do not satisfy the test articulated by the Eleventh Circuit. Sullivan v. Naturalis, Inc., 5 F.3d 1410, 1412 (11th Cir. 1993).

Microdecisions, Inc. v. Skinner, No. 2:02-cv-639-FTM-29DNF, 2003 U.S. Dist. LEXIS 14846 (M.D. Fla. Feb. 5, 2003 (unpublished order). It concluded that Microdecisions' complaint did not state causes of action that arose under federal copyright law.

The federal court's well-reasoned order is supported by Florida law as well. The First District addressed similar facts in Department of Health & Rehabilitative Services v. Southpointe Pharmacy, 636 So. 2d 1377 (Fla. 1st DCA 1994). [*7] In that case, the pharmacy filed a petition for writ of mandamus seeking documents pursuant to Florida's public records law, section 119.07, Florida Statutes. As in this case, the complaint did not allege a cause of action under the federal copyright law, but the public entity defended on the ground that the documents were copyrighted. The Southpointe court held that under the federal well-pleaded complaint rule a copyright defense does not defeat state court jurisdiction. 636 So. 2d at 1380. As such, the Florida state courts had jurisdiction over the matter.

This case, like Southpointe, arises under Florida's public records law, not under federal copyright law. Copyright is not an essential element of Microdecisions' claim. As such, as a matter of both federal and Florida law, the circuit court erred when it determined this controversy belonged in federal

court. And, as we have previously discussed, Microdecisions' public records claim is not moot. Accordingly, we reverse the judgment in favor of Skinner.

The issue presented here is purely one of law; the facts are undisputed. We therefore examine whether the circuit court erred [*8] in denying Microdecisions' cross-motion for summary judgment. See Bridgham v. Skrzynski, 873 So. 2d 496, 499 (Fla. 2d DCA 2004); Royal Neth. Realty, Inc. v. Ross, 421 So. 2d 642, 643 (Fla. 3d DCA 1982). We hold that Skinner has no authority to assert copyright protection in the GIS maps, which are public records. Accordingly, Microdecisions was entitled to summary judgment as a matter of law.

Congress explicitly denied copyright protection to works of the United States government, 17 U.S.C. § 105, but it did not restrict state governments in that regard. "Works of state governments are therefore left available for copyright protection by the state or the individual author, depending on state law and policy, and subject to exceptions dictated by public policy . . . ." Bldg. Officials & Code Adm'rs, Inc. v. Code Tech, Inc., 628 F.2d 730, 735-36 (1st Cir. 1980); see also County of Suffolk, N.Y. v. First Am. Real Estate Solutions, 261 F.3d 179, 188 (2d Cir. 2001). Thus, Florida law determines whether Skinner may claim a copyright in his office's creations.

In Florida, a citizen's right of access [*9] to public records is protected both by the Florida Constitution and the Florida statutes. Art. I, § 24(a), Fla. Const. (1992) (the "Sunshine Amendment"); ' 119.01, Fla. Stat. (2002). Although the Sunshine Amendment was not adopted until 1992, Florida has a long-standing legal tradition of permitting access to its public records. See In re Report & Recommendations of Judicial Mgmt. Counsel of Fla. on Privacy & Elec. Access to Court Records, 832 So. 2d 712, 713 (Fla. 2002) (stating that

in Florida "open access to public records is both a constitutional right and a cornerstone of our political culture"). Our first public records law was enacted in 1892. §§ 1390, 1391, Fla. Stat. (Rev. 1892). Its existing progeny, section 119.01(1), declares the policy that "all state, county, and municipal records shall be open for personal inspection by any person."

The custodian of any public record must furnish a copy of the record upon payment of the fee prescribed by law, generally the cost of reproduction. § 119.07(1)(a). A requester's motive for seeking a copy of documents is irrelevant. News-Press Pub. Co. v. Gadd, 388 So. 2d 276, 278 (Fla. 2d DCA 1980). [*10] Moreover, the fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law. Since 1905, it has been clear that public records may be used in a commercial, profit-making business without the payment of additional fees. See State ex rel. Davis v. McMillan, 49 Fla. 243, 38 So. 666 (Fla. 1905). McMillan interpreted the 1892 statute, which provided that public records shall be open to the public "for the purpose of inspection thereof, and of making extracts therefrom." Id. at 667. In that case the clerk of the court had argued that he could prevent employees of an abstract company from taking extracts from the public records to be compiled and sold unless the company paid him large amounts for inspecting the records and extracting them. The court held that the public records law forbade such a demand for fees. Id.

To be sure, the legislature may exempt specific public records from the public records law. See Bevan v. Wanicka, 505 So. 2d 1116, 1118 (Fla. 2d DCA 1987). The Sunshine Amendment permits the legislature, by two-thirds vote, to [*11] enact exemptions for public records, but only after specially defining a public necessity and narrowly tailoring the exemption to that necessity. Art. I., § 24(c), Fla. Const.

Accordingly, the legislature has allowed restrictions on the unlimited access to some public records by enacting specific statutes authorizing certain agencies to obtain copyrights in particular circumstances. See, e.g., § 24.105(10), Fla. Stat. (2003) (authorizing the Department of the Lottery to hold copyrights); § 601.101, Fla. Stat. (2003) (permitting the Department of Citrus to hold legal title to copyrights); § 1004.23, Fla. Stat. (2002) (authorizing universities to secure copyrights in certain works). No statute authorizes a county property appraiser to hold a copyright.

Additionally, the legislature has specifically permitted certain categories of public records to be copyrighted. Section 119.084 permits agencies to acquire and hold copyrights for data processing software the agencies have created. n2 The staff analysis of the Senate bill that created section 119.084 recognized that a law permitting copyright protection [*12] of public records creates a public records exemption as contemplated in the Sunshine Amendment. Therefore a statement of public necessity was required under the Sunshine Amendment and was included in the bill. See Fla. S. Comm. on Comprehensive Planning, CS for SB 2220 (2001) Staff Analysis (Apr. 10, 2001) (on file with comm.).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Skinner does not claim that section 119.084 applies to the public records at issue here. Moreover, Florida's attorney general has opined that GIS maps

> "do not appear to constitute 'data processing software' as defined in section 119.084(1)(b), Florida Statutes, and thus are not subject to the copyright and licensing authorization contained in that statute." Op. Att'y Gen. Fla. 03-42 (2003).

- - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

In his brief, Skinner claims that nothing in the Florida Statutes precludes a constitutional officer such as himself from holding a copyright on the GIS maps. He misconstrues the interplay between the federal copyright act and Florida's public records [*13] laws. The copyright act gives the holder the exclusive rights to reproduce and distribute a work and to authorize others to do so. 17 U.S.C. § 106(1), (3). As such, a copyright owner may refuse to provide copies of the work or may charge whatever fee he wants for copies of the work or a license to use the work. The Florida public records law, on the other hand, requires State and local agencies to make their records available to the public for the cost of reproduction. § 119.07(1)(a). This mandate overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption. See Art. I. § 24, Fla. Const.; see also Op. Att'y Gen. Fla. 03-42 (2003) (stating that in the absence of statutory authorization and "in light of Florida's Public Records Law, Palm Beach County is not authorized to obtain copyright protection and require license agreements for its Geographic Information Systems (GIS) and related data in order to regulate and authorize redistribution of these materials for commercial use"); Op. Att'y Gen. Fla. 88-23 (1988) (reciting that State Attorneys may not, without statutory [*14] authority, assert copyright in training films they produced); accord Op. Att'y Gen. Fla. 00-13 (2000) ("[A] state agency is not authorized to secure or hold a trademark in the absence of specific statutory authority to do so."). Skinner has not claimed that any public records exemption applies, and indeed we have found none that do.

We recognize that in Suffolk County, the Second Circuit held that the New York Freedom of Information Law did not prevent a county from holding a copyright in GIS maps the county had produced. 261 F.3d at 195. But New York law is not Florida law.

We offer no opinion on the federal circuit's analysis because it simply has no application in this case. Each state may determine whether the works of its governmental entities may be copyrighted. Code Tech, 628 F.2d at 735-36; see also 1 Melville and David Nimmer, Nimmer on Copyright § 5.14, at 5-106 (2002). As we have explained, Florida's Constitution and its statutes do not permit public records to be copyrighted unless the legislature specifically states they can be.

Accordingly, we hold that Skinner cannot prevail on his defense [*15] of copyright. Microdecisions is entitled to summary judgment as a matter of law. We reverse the summary judgment entered in Skinner's favor and remand with directions to enter summary judgment in favor of Microdecisions.

Reversed and remanded.

STRINGER and DAVIS, JJ., Concur.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

MICRODECISIONS, INC., a Florida Corporation,

Plaintiff

vs. Case No. 2:02-cv-639-FTM-29DNF

ABE SKINNER, CFA, as Property Appraiser of Collier County, Florida,

Defendant.

ORDER

This matter comes before the Court on Plaintiff Microdecisions Motion to Remand (Doc. #13), filed January 13, 2003. Defendant filed a Memorandum of Law in Opposition (Doc. #15) on January 22, 2003. Also before the Court is plaintiff's Motion for Costs and Fees (Doc. #12) and defendant's Memorandum of Law in Opposition (Doc. #14).

Plaintiff's two count Complaint for Declaratory and Injunctive Relief and for Writ of Mandamus for Access to Public Records (Doc. #2) (the Complaint) was originally filed in the Twentieth Judicial Circuit Court, in and for Collier County, Florida. The Complaint seeks to compel defendant Abe Skinner, as the Collier County Property Appraiser, to release certain geographic information systems (GIS) documents and tax maps pursuant to Florida's public records laws. Defendant filed a timely Notice of Removal (Doc. #1), asserting that he had filed a claim of copyright for the records at issue with The Copyright Office, that the case arose under the Copyright Act within the meaning of 28 U.S.C., § 1338, and

that the case was therefore removable.

Plaintiff's motion to remand asserts that the Court lacks subject matter jurisdiction because the claims do not "arise under" the Copyright Act, and therefore the case must be remanded to state court. On a motion to remand, the party seeking to invoke federal jurisdiction bears the burden of establishing the jurisdiction of the federal court. Williams v. Best Buy Co., Inc., 269 F. 3d 1316, 1319 (11th Cir. 2001). Thus, the burden of establishing federal question jurisdiction in this case is upon defendant.

I.

Removal jurisdiction exists only where the district court would have had original jurisdiction over the action, unless Congress expressly provides otherwise. 28 U.S.C. § 1441(a); Darden v. Ford. Consumer Fin. Co., Inc., 200 F.3d 753, 755 (11th Cir. 2000). In this case, defendant invoked a district court's original jurisdiction over "any civil action arising under any Act of Congress relating to ... copyrights ...." 28 U.S.C. § 1338(a). Because § 1338(a) is substantially identical to the general federal question jurisdiction statute, 28 U.S.C. § 1331, the same law applies to it.

A cause of action "arises under" federal law only when plaintiff's well-pleaded complaint raises issues of federal law. Rivet v. Regions Bank of La., 522 U.S. 470, 474-75 (1998) summarized the well-pleaded complaint rule:

> We have long held that "[t]he presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint." Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987); see also Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908) . A defense is not part of a plaintiff's

> properly pleaded statement of his or her claim. See Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 56, 63 (1987); Gully v. First Nat. Bank in Meridian, 299 U.S. 109, 112 (1936) ("To bring a case within the [federal-question removal] statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.") Thus, "a case may not be removed to federal court on the basis of a federal defense, . . . even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case." Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal., 463 U.S. 1, 14 (1983).

Rivet also noted that an independent corollary to the well-pleaded complaint rule is that a plaintiff may not defeat removal by artful pleading which omits federal claims from the face of the complaint. Id. at 475. See also Behlen v. Merrill Lynch, 311 F.3d 1087, 1090 (11th Cir. 2002); Anderson v. H&R Block, Inc., 287 F.3d 1038, 1041- 42 (11th Cir. 2002.)

II.

The first task is to determine what the Complaint alleges, keeping in mind both that it must be well-pleaded and yet not artfully pleaded. The well-pleaded complaint in this case alleges that the documents are public records to which the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular, and they do not satisfy the test articulated by the Eleventh Circuit. Sullivan v. Naturalis, Inc., 5 F.3d 1410, 1412 (11th Cir. 1993). Plaintiff has simply reported

defendant's reliance on the federal copyright law to deny the access sought by plaintiff) Doc. #2, ¶¶ 13, 25), and anticipated a Copyright Act defense by discussing it in the Complaint. As the cases cited above discussed, merely anticipating a federal defense in a complaint is insufficient to satisfy the "arise under" standard. See also State Dept. Of Health and Rehabilitative Servs. v. Southpointe Pharmacy, 636 So.2d 1377, 1380 (Fla. 1st DCA 1994). The Court concludes that the Complaint does not state causes of action which arise under the federal copyright laws.

Defendant argues that the exception to the well-pleaded complaint rule applies in this case because federal copyright law completely preempts the state law claims. "Federal courts have not extended federal subject matter jurisdiction to every lawsuit involving copyrighted material, however." Sullivan v. Naturalis, Inc., 5 F.3d at 1412. See also Foley v. Luster, 249 F. 3d 1281, 1285 (11th Cir. 2001). The Court concludes that the Copyright Act does not completely preempt the state law public records access claims in the Complaint.

The award of costs and expenses, including attorney fees, is a matter within the sound discretion of the court. Fowler v. Safeco Ins. Co. Of Am., 915 F.2d 616, 617 (11th Cir. 1990). Fees and costs may be awarded even though the removing party did not act in bad faith. Mints v. Educational Testing Serv., 99 F.3d 1253, 1260 (3d Cir. 1996); Publix Supermarkets, Inc. v. United Food & Commercial Workers Int'l Union, 900 F. Supp. 419, 421-22 (M.D. Fla. 1995) The propriety of defendant's removal is the central consideration in determining whether to impose fees. Miranti v. Lee, 3 F.3d 925, 928 (5th Cir. 1993). While the Court ultimately disagrees with defendant's arguments concerning removal, the Court exercises its discretion and finds that fees and costs will not be awarded.

Accordingly, it is now

ORDERED:

1. Plaintiff Microdecisions, Inc.'s Motion to Remand (Doc. #13) is **GRANTED**. The Clerk is **directed** to remand

the case to the Circuit Court of the Twentieth Judicial Circuit, in and for Collier County, Florida, and to transmit a certified copy of this Order to the Clerk of that Court.

2. Plaintiff's Motion for Costs and Fees (Doc. #12) is **DENIED**.

3. The Clerk is **directed** to close this case and terminate all previously scheduled deadlines as **moot**.

DONE AND ORDERED at Fort Myers, Florida, this 5th day of February, 2003.

S

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Clerk, Circuit Court, Collier County
Hon. Douglas N. Frazier
Counsel of record
District Courtroom Deputy
District Law Clerk

No. 05-383

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

ABE SKINNER, as Collier County (Fl) Property Appraiser,

Petitioner,

v.

MICRO DECISIONS, INC., a Florida Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

BRIEF IN OPPOSITION

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October 24, 2005

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QUESTION PRESENTED

Respondent disagrees with the manner in which the Petitioner framed the question presented and respectfully restates the question as follows:

Whether a state court has jurisdiction to determine whether copyright may be asserted in the records of the state.

PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioner correctly identified the parties. Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent states that it is a nongovernmental corporation, that it has no corporation and no publicly held company owns 10% or more of the corporation's stock.

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STATEMENT OF THE CASE

This case presents the simple question of whether federal or state law determines whether a state will assert the subsisting copyright in its records. It is well established that this determination is left to each state and Florida has determined, with rare exceptions, not to enforce the copyright in its records. The exceptions (where the right to assert copyright in documents created by state agencies has been legislatively granted) prove the rule. Florida's determination on this point is further exemplified by the depth and breadth of Florida's public records law which brooks no restrictions on access to government records unless a carefully crafted statutory exemption applies.

Petitioner, Abe Skinner, as Property Appraiser of Collier County Florida produces the GIS tax maps which are the public records at issue in this case. Respondent, MicroDecisions, Inc., requested a copy of the maps pursuant to Florida's public records law. Skinner offered to either provide the maps for the statutorily permissible cost and subject to a personal use license or to provide the maps at a cost of approximately 100 times the statutorily permissible cost if MicroDecisions wished to use the maps for a commercial purpose. As Skinner is not entitled to assert the copyright in the requested records, this constituted a violation of Florida's public records law.

Unable to persuade Skinner of the error in his position, MicroDecisions filed its complaint for declaratory and injunctive relief and for a writ of mandamus for access to the requested records. The court issued the writ of mandamus requiring Skinner to produce the records. MicroDecisions faxed the writ to Skinner's counsel and delivered

the writ to the sheriff for service, as instructed by the court. While awaiting the completion of service (which included payment of the statutory fee), MicroDecisions received the disks from Skinner allegedly containing the records, along with a copy of the personal use license and a letter advising that use of the records constituted assent to the license.

Skinner removed the case to the Middle District of Florida. MicroDecisions moved for remand, resulting in the remand order found in the appendix to the Petition. Petition for a Writ of Certiorari ("Pet.") 12a-16a. After remand, the parties filed cross motions for summary judgment. The trial court ruled that the case was moot because Skinner already had delivered the records and that the question of Skinner's authority to assert the copyright in the tax maps was within the exclusive jurisdiction of the federal courts. MicroDecisions appealed to the Florida Second District Court of Appeal and obtained a reversal of the trial court's judgment. Pet. 1a-11a.

The Second District agreed with MicroDecisions that Florida has determined not to assert the copyright in its public records and as a result, Skinner may not seek to enforce the copyright in the requested records against the public. Skinner sought review in the Florida Supreme Court, which declined to exercise its discretionary jurisdiction.

REASONS FOR DENYING THE PETITION

The parties agree that copyright vests in an original work at the time that such work is fixed in a tangible medium. 17 U.S.C. §102 ("Copyright protection subsists, in

accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . "). What Skinner fails to appreciate is that when the work is created by a state official, it is a question of state law whether the subsisting copyright may be asserted. *See, e.g., Building Officials & Code Adm'rs Int'l, Inc. v. Code Tech, Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980) (holding that "[w]orks of state governments are therefore left available for copyright protection by the state or the individual author, *depending on state law and policy*, and 'subject to exceptions dictated by public policy with respect to such publications as statutes and judicial opinions.'") (quoting LATMAN, THE COPYRIGHT LAW 43 (5th ed. 1979)) (emphasis supplied) and 1 MELVILLE AND DAVID NIMMER, NIMMER ON COPYRIGHT §5.14 (2005). Under Florida law, the subsisting copyright may not be enforced unless the legislature has enacted a specific statutory authorization permitting assertion of the copyright. This is purely a question of state law and the state has decided against Skinner.

I. WHETHER A STATE AGENCY OR OFFICIAL MAY ASSERT COPYRIGHT IN GOVERNMENT RECORDS IS A QUESTION OF STATE LAW.

Skinner commences his argument by citing 28 U.S.C. §1338(a) which provides that exclusive jurisdiction resides in the federal courts for "any civil action arising under" the Copyright Act. This case simply does not "arise under" the Copyright Act. This case arises under the Florida public records law. FLA. STAT. ch. 119.07 (2002). As Judge Steele held in the order remanding the case to the circuit court:

> The well-pleaded complaint in this case alleges that the documents are public records to which

> the Property Appraiser must allow access pursuant to Florida law, without further restriction. Nothing about the claims in the Complaint arise out of federal law in general or the Copyright Act in particular.

The Copyright Act provides that the federal government may not assert copyright in its records. 17 U.S.C. §105. The Act does not speak directly to the enforcement of copyright in records created by state governments. Skinner correctly asserts that the silence of the Copyright Act leaves available copyright protection for state records. But what Skinner fails to appreciate is that the decision whether to assert copyright protection in state records is a question of state law. *See, e.g., County of Suffolk, New York v. First American Real Estate Solutions,* 261 F.3d 179, 188 (2nd Cir. 2001) (hereafter *Suffolk County*) (holding "[t]hus, although a state and its subdivisions may own a copyright as a matter of copyright law, it may be that Suffolk County is not permitted to do so in this instance. The question becomes whether New York's Legislature, by enacting FOIL, has ceded Suffolk County's copyright.").

The Second Circuit Court of Appeals in *Suffolk County* determined that New York would assert copyright protection in its state records. *Id.* at 190. And in *Wisconsin v. Law Office Information Services,* 1999 WL 649235 (Wis. Ct. App. 1999), the Wisconsin State Court of Appeals determined that Wisconsin would enforce its copyright in its government records as well.[1]

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[1] Skinner's citation to this case, in which the Wisconsin Court of Appeals held that the state could enforce the copyright in the "material produced by the Revisor of Statutes to accompany the text of the statutes and administrative code in the official publications" (*Law*

(Continued on following page)

Through its unwavering history of broad enforcement of the public records law in the face of copyright challenges, a series of opinions directly on point from the Florida Attorney General, and finally, in the decision for which Skinner is seeking review, the state of Florida has provided unequivocally that a state agency or official may not assert copyright in government records unless the legislature has specifically provided therefor.

Once a state has determined that the copyright may not be asserted in its government records, there is no federal question. And thus there is no federal question here.

A. THE SECOND DISTRICT COURT OF APPEALS DID NOT MISCONSTRUE THE SIGNIFICANCE OF THE UNITED STATES DISTRICT COURT'S ORDER ON REMAND.

Skinner argues that the Second District Court of Appeal accorded undue significance to the order remanding this case to the circuit court. Pet. 6. The Second District only cited a single paragraph of the remand order prior to its independent determination that the question of Skinner's ability to assert copyright in the requested records was one of state law.

Office Information Systems, at *1), belies his repeated assertions that no other state court has ever addressed this issue. Pet. 4, 7. This case proves the fallacy of Skinner's jurisdictional arguments. Here, the copyright issue, which Skinner claims must be addressed in federal court only, was determined by a state court as ancillary to a breach of contract claim.

The single paragraph cited by the Second District was the Middle District's determination that this case arises under the Florida public records law and not the Copyright Act. Pet. 6a. Skinner complains that the Middle District reached this determination solely on the allegations of the complaint. Pet. 6. This is precisely what the Middle District was required to do – ascertain from the four corners of the complaint whether there was a federal question that required or permitted determination in the federal courts. *See generally* 17A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶120.12[3][b] (3d ed. 2005). The Middle District found that the matter was one entirely of state law. Pet. 14a-15a.

Skinner argues that if the Middle District had the same information as the Second District Court of Appeal, it might have reached a different conclusion. Pet. 6. Specifically, Skinner complains that the Middle District "could not consider that Respondent withheld payment of the fee for the requested GIS data files, in order to bring this as a public records case . . . [or] that the public records at issue have already been provided . . . [rendering] the public records claim [] moot."[2] Pet. 7. Skinner asserts that these issues would have been relevant to the Middle District's decision because they render all issues moot except the determination of whether Skinner can assert copyright protection for works created by his office. Pet. 7. All of this information was irrelevant to the jurisdictional determination by the Middle District, as it is irrelevant to

[2] What MicroDecisions had was a disc purporting to contain the records and a personal use license that purported to take effect as soon as the disc was accessed. This was not access to the records and certainly did not moot the dispute between the parties.

this Court, because the ultimate determination of these issues is a question of state law.

To support his position, Skinner looks to the Second Circuit's decision in *Suffolk County*. Skinner asserts that the *Suffolk County* "decision certainly does not hold that a state court can decide whether a state or its subdivisions have authority to claim copyright." Pet. 7. This statement clarifies Skinner's fundamental misunderstanding of the division between state and federal authority with respect to this issue.[3] The *Suffolk County* court found that copyright subsists in state court records, but that thereafter, "[t]he question becomes whether New York's Legislature, by enacting FOIL, has ceded Suffolk County's copyright." *Suffolk County*, at 188. This is an explicit acknowledgment by the Second Circuit that the assertion of the subsisting copyright in state records is an issue exclusively of state law. When the Second Circuit analyzed the foregoing question, it did so under New York state law, a determination that could have well been made by a New York state court, as the decision under review was made in a Florida state court.

Skinner's position is that this is an issue of state law that can only be decided in federal court. The sheer illogic of this statement requires no counterargument.

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[3] Skinner's argument also establishes his fundamental misunderstanding of the distinction between the existence of the copyright in the records which vests automatically at the time of creation (17 U.S.C. §102) and the authority of Skinner as a government agent to assert the copyright. Skinner equates the existence of the copyright with a grant of authority to enforce it.

B. THE SECOND DISTRICT COURT OF APPEAL DID NOT MISCONSTRUE THE LAW CONTROLLING JURISDICTION OF THIS CASE.

Skinner argues that if the Second District had understood that the case was moot because MicroDecisions had the requested records, it would have realized that only the copyright issue remained and that it did not have subject matter jurisdiction over the copyright issue. Pet. 8-9. Even if the dispute over the requested records was moot, the copyright issue would still have properly been before the Second District because the determination regarding Skinner's authority to assert the copyright in public records is a question of state law. And, though one would not expect that it needs to be said, questions of state law may be decided by state courts.

Skinner attempts to use this mootness argument to dismiss *State Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377 (Fla. 1st DCA 1994). *Southpointe* is the only other Florida case in which a state agency has raised a copyright defense to a public records request. In *Southpointe*, the plaintiff brought suit for mandamus under the public records law to compel the department to provide a copy of a transcript of a hearing. *Id.* at 1378. The department raised the defense that providing a copy of the transcript would violate the court reporter's copyright. *Id.* at 1379. On the jurisdictional point, the court said the Florida circuit court had subject matter jurisdiction:

> A case arises under copyright law if a well-pleaded complaint establishes either that copyright law creates the cause of action or that the plaintiff's right to relief necessarily depends

> on resolution of a substantial question of copyright law, in that copyright law is a necessary element of one of the well-pleaded claims.
>
> The present case arises under the [public records law]. The amended petition notwithstanding, copyright law is not an essential element of Southpointe's claim. Again by analogy to federal-question jurisdiction, a copyright law defense ought not defeat state court jurisdiction even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case.

Id. at 1380 (citations omitted).

Southpointe is on all fours with the jurisdictional issue here. It has never been questioned by any Florida or other court, and Judge Steele cited it with approval in the remand order. Pet. 15a.

Skinner's ultimate confusion regarding the roles of federal and state law in determining the matter at hand is displayed by the conclusion to the jurisdictional argument:

> States may well have the authority to determine who among their government may claim entitlement to copyright protection for their works, which Florida has not done, but that does not grant a state court jurisdiction to decide who is entitled to hold a copyright.

Pet. 12. This statement blends a misunderstanding of the distinction between the subsisting copyright and Skinner's authority as a state official to enforce it and a misunderstanding of the role of state courts in interpreting state law. The copyright in the tax maps vests in the creator at the time the work is fixed in a tangible medium, but this

does not give Skinner the authority to enforce this copyright. Skinner may only be granted this authority by the state of Florida, which ***has*** made a determination regarding enforcement of the copyright in its government records. The determination is extant in the public records law which requires unfettered access and in the limited number of statutes which grant copyright protection to specific works of the state only. It has been explained in numerous opinions of the Florida Attorney General (Op. Fla. Att'y Gen. 2003-42; Op. Fla. Att'y Gen. 1988-23; Op. Fla. Att'y Gen. 1986-94) and it has been explained in the Second District Court of Appeal's decision in this case. The copyright vests at the time of creation and the state of Florida has determined that Skinner may not assert it against the public which is entitled to unfettered access to the records of its state agencies.

C. THE SECOND DISTRICT CORRECTLY DETERMINED THAT FLORIDA'S PUBLIC RECORDS LAW ABROGATES SKINNER'S COPYRIGHT CLAIM.

Skinner takes issue with the Second District Court of Appeal's ruling that "'[t]he Florida public records law . . . requires State and local agencies to make their records available to the public for the cost of reproduction. This mandate overrides a governmental agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption.'" Pet. 12. Skinner argues that the Copyright Act preempts the states' ability to determine whether copyright may be asserted in state records.

Congress left it up to the states to determine the extent to which they would each avail of the copyright in

works created by their agencies. Though Congress explicitly denied copyright protection to works of the United States government (7 U.S.C. §105) it made no mention of the works of the state governments. "Works of state governments are therefore left available for copyright protection by the state or the individual author, *depending on state law and policy*, and 'subject to exceptions dictated by public policy with respect to such publications as statutes and judicial opinions.'" *Building Officials & Code Adm'rs Int'l, Inc. v. Code Tech, Inc.*, 628 F.2d 730, 735-36 (1st Cir. 1980) (quoting LATMAN, THE COPYRIGHT LAW 43 (5th ed. 1979)) (emphasis supplied). Nimmer agrees that this is a question "of state law itself." 1 MELVILLE AND DAVID NIMMER, NIMMER ON COPYRIGHT §5.14 (2005).

Skinner's arguments regarding preemption are therefore misplaced. Questions of preemption only arise when there is a tension or conflict between federal and state law. In the present case, the state is left to determine whether copyright may be enforced in its records. If the state determines that copyright may be enforced in its records, as Florida has with respect to a small number of its records, then the federal copyright law applies to those records. If, however, a state determines that copyright may not be asserted in its records, as Florida has with respect to most of its records, including the records at issue in this case, the copyright law has no application to those records and there is no tension between the federal and state law.[4]

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[4] The parties agree that *Suffolk County* and *Wisconsin v. Law Office Information Systems* are the only other cases in the country to have addressed the issue at stake in this case. Neither of these cases

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Florida has chosen to assert its subsisting copyright only selectively and to leave the vast majority of its records available for unfettered access by the public. For many years, the Florida Attorney General has consistently advised state officers that in the absence of express legislative authority they may not enforce copyright in records of their offices. *See generally* Op. Fla. Att'y Gen. 1988-23 and Op. Fla. Att'y Gen. 1986-94.

As recently as September 3, 2003, the Attorney General reiterated this advice. *See* Op. Fla. Att'y Gen. 2003-42, 2003 WL 22055615. This advisory opinion to the Palm Beach County Attorney advised that "in light of Florida's Public Records Law, Palm Beach County [a chartered home rule government] is not authorized to obtain copyright protection and require license agreements for its Geographic Information Systems (GIS) maps and related data in order to regulate and authorize redistribution of these materials for commercial use." *Id.* at *3. The force of this opinion as well as the opinions cited above applies fully to Skinner.

It is quite obvious that the legislature agrees with the Attorney General that its permission is needed in each specific case where an officer seeks to enforce a copyright. Thus for example, in 1990, the Legislature enacted the statute now found at FLA. STAT. ch. 119.084 (2002) which carefully distinguishes between "data processing software" and "data," and grants agencies limited authority "to acquire and hold copyrights for data processing software created by the agency and to enforce its rights pertaining

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mentions preemption because both clearly delineate the roles of federal and state law in the same manner as the decision under review.

to such copyrights." FLA. STAT. ch. 119.084(2) (2002). The statute does not authorize agencies to enforce copyright in the data itself and takes pains to assure that the agencies may not enforce data processing copyrights in such a manner as to impede public access to the data therein. FLA. STAT. ch. 119.084(2)(a) (2002).

Other statutes authorize specific agencies to claim copyright or other intellectual property rights in their work product, but the Legislature has been particular about who it authorizes to enforce copyright. *E.g.*, FLA. STAT. ch. 240.229 (2002) (universities). It has not authorized property appraisers to assert copyright in the tax maps. With Skinner's copyright ceded to the public, there is no federal law at issue and Skinner's extensive discussion of preemption is for naught.

II. THERE IS NO CONFLICT BETWEEN THE FLORIDA STATE COURTS AND THE SECOND CIRCUIT COURT OF APPEALS REGARDING COPYRIGHT IN STATE RECORDS.

Skinner argues that the decision offered for review is in conflict with the *Suffolk County* case from the Second Circuit Court of Appeals. While the factual issues presented in the instant case and *Suffolk County* are in fact similar, the legal interpretation of those facts is based on entirely separate bodies of state law as this case is governed by Florida state law and *Suffolk County* is governed by New York state law.

In *Suffolk County*, a home rule county of New York brought an infringement suit in the United States District Court against several companies which had acquired GIS maps from the county, aggregated them with maps of

other counties, and sold access to the resulting database to customers. *Suffolk County*, at 183. The county alleged that this infringed the county's copyright in these GIS maps.[5] *Id.*

When the defendants asserted that the State of New York's Freedom of Information Law ("FOIL") provided a complete defense, the Second Circuit agreed that this was a dispositive issue. *Id.* Although it is true that works of a subdivision of a state are eligible for copyright protection, the Second Circuit said, it is also true that "the New York State Legislature may enact laws that impact the property or affairs of local governments such as Suffolk County, especially on matters of state concern." *Id.* at 188 (citing, *inter alia*, *Williams v. Mayor of Baltimore*, 289 U.S. 36, 40 (1933)) (holding that subdivisions of states have no federally protected constitutional rights in property as against their state governments). The court then concluded:

> Thus, although a state and its subdivisions may own a copyright as a matter of copyright law, it may be that Suffolk County is not permitted to do so in this instance. The question becomes whether New York's Legislature by enacting FOIL has ceded Suffolk County's copyright.

Id.

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[5] *Suffolk County* brought a suit for infringement which genuinely arose under the Copyright Act because it had not created the access issue that Skinner created by insisting that the requester sign a license as a condition to gaining access to the records. That is how it came to be that *Suffolk County* ended up in a Federal court construing New York law whereas this case came through the state courts on a question of Florida law.

In the end, the court held that, as a matter of New York state law, FOIL did not abrogate the subsisting copyright because it required nothing more of an agency than that it make a single copy of a requested record available for copying by the public and did not prohibit assertion of copyright to restrict the requester's further use of the copy. *Id.* at 189.

Although *Suffolk County* does not control the outcome of this case, the cases are in accord with respect to the essential issue. *Suffolk County* holds that a state agency's ability to assert a copyright is determined not by federal law, but by state law.

A. THE SECOND CIRCUIT'S CONCLUSION THAT FOIL DOES NOT ABROGATE SUFFOLK COUNTY'S COPYRIGHT IS BASED ON THAT FEDERAL COURT'S INTERPRETATION OF NEW YORK STATE LAW.

In *Suffolk County* the determinative question of New York state law was much debated. The District Court initially held for the county and then reversed itself on rehearing. *County of Suffolk, New York v. Experian Information Solutions, Inc.*, 2000 WL 1010262 (S.D.N.Y. 2000) (county's suit for infringement dismissed for failure to state a claim on the ground that FOIL precluded such claim of copyright by a state agency). However, the Second Circuit concluded that the District Court was right on the state law issue the first time, held that FOIL did not abrogate the copyright, and reversed and remanded. *Suffolk County*, at 194.

The Second Circuit concluded that "FOIL provides only that '[e]ach agency shall, in accordance with its

published rules, make available for public inspection and copying all records' . . . " *Suffolk County*, at 188. The court concluded that "[i]t is one thing to read this provision to permit a member of the public to copy a public record, but it is quite another to read into it the right of a private entity to distribute commercially what it would otherwise, under copyright law, be unable to distribute." *Id.* at 189.

The court based this conclusion on two chief factors. First, it looked strictly at the language of the statute, which says only that, with respect to nonexempt records, "[e]ach agency shall, in accordance with its published rules, make available for public inspection and copying all records." *Id.* at 188 (quoting N.Y. Pub. Off. Law § 87(2) (McKinney Supp. 2001)). From this language and the absence of any further language, the court concluded that "the text of FOIL provides no clear indication" of an intent to abrogate the copyright. *Id.*

The court next emphasized that the statute is "silent as to what may occur after a state agency discloses its records." *Id.* at 189. The court found this silence important because "[w]hen the current version of FOIL was enacted in 1977, there was an established recognition that certain state entities could possess a copyright." *Id.* (citing, *inter alia*, Op. N.Y. Att'y Gen., 1973 WL 20304 (1973)). This led the court to its ultimate conclusion: "Because FOIL was enacted against such a baseline, yet did not specifically address its impact on a state agency's copyright, this silence is deafening." *Id.*

This parsimonious reading of the rights of the people of New York under FOIL is not binding on New York courts, and the day may come when a state court will adopt the opposite view of New Yorkers' rights under

FOIL. However, this is not a concern of this case, which is governed instead by Florida law.

B. THE PEOPLE OF FLORIDA HAVE RESERVED TO THEMSELVES THE UNFETTERED AND OVERRIDING "RIGHT TO COPY" AND THEREBY ABROGATED THE RIGHT OF THEIR STATE AGENCIES TO CLAIM COPYRIGHT IN THE ABSENCE OF A VALID STATUTE.

Florida's legal tradition of public access to the records of government is older, more robust, and more expansive than the Second Circuit's view of FOIL. Our first public records law was enacted in 1892, and during the one hundred and eleven years since then, the law has been clear that the right of access to records of government is an inherent attribute of citizenship under Florida government. *See Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2nd DCA 1985), *review denied*, 475 So. 2d 695 (Fla. 1985) (recognizing that the "breadth of such right [of access] is virtually unfettered, save for the statutory exemptions").

Though the statutory right of access always was robust and well-nurtured by liberal judicial construction, the people ultimately found it appropriate to elevate this right to constitutional stature. FLA. CONST. art. I, §24. *See also Frankenmuth Ins. Co. v. Magaha*, 769 So. 2d 1012, 1021 (Fla. 2000) (explaining that the Sunshine Law "is of both constitutional and statutory dimension").

The Sunshine Amendment provides that "every person has the right to inspect or copy any public record . . . " FLA. CONST. art. I, §24(a). It further provides, "[t]his section shall be self-executing." FLA. CONST. art. I, §24(c). This

self-executing right of access elevated Florida's one hundred year-old legal tradition constituting the public right of access to records of government to constitutional stature. *See* Op. Fla. Att'y Gen. 1996-32 (explaining that "[t]he courts have recognized that Article I, section 24, Florida Constitution, has elevated to constitutional status the public's right to government in the sunshine that has previously been recognized by statute").[6]

In the Sunshine Amendment, the people reserved to themselves that same right which Skinner asserts here – the "right to copy." Our constitution states that "every person has the right to inspect and copy any public record." FLA. CONST. art. I, §24(a). This *public* right to copy is antithetical to the core right created by the Copyright Act: the owner's "*exclusive* right[] . . . to reproduce the copyrighted work in copies . . . " 17 U.S.C. §106(1) (emphasis supplied). Under Article I, Section 24(a) of the Florida Constitution, Skinner obviously does not have the "copyright" because he lacks the exclusive right to reproduce his records in copies. In Florida, therefore, it is not Skinner, but the people, who have the "right to copy."

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[6] *See also Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 868 (Fla. 3rd DCA 1994) (explaining that "[t]he new Constitutional amendment does not create a new legal standard by which to judge Sunshine Law cases . . . [W]e find no reason to construe the amendment differently than the Supreme Court has construed the statute. *Accord, Zorc v. City of Vero Beach*, 722 So. 2d 891, 896 (Fla. 4th DCA 1998) (agreeing that "[t]he language in Article I, Section 24(b) of the Florida Constitution is virtually identical to that of section 286.011(1), Florida Statutes"); *Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) (holding there is "no reason to construe the constitutional provision differently from the statute").

The right to copy is a self-executing right enumerated in the Declaration of Rights, (FLA. CONST. art. I, §24(a)), and the courts have long since foresworn any authority to read limitations or exemptions into the right, *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp.*, 729 So. 2d 373, 380 (Fla. 1999) (holding that the constitution forbids courts to imply exemptions); *Wait v. Florida Power & Light Co.*, 372 So. 2d 420 (Fla. 1979) (holding that Chapter 119 forbids implication of exemptions). Only the legislature is authorized to curtail the constitutional right of access under the exacting constitutional standard. FLA. CONST. art. I, §24(c). *See also Halifax Hosp. Med. Ctr. v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). It follows that no authority short of a valid exemption adopted by the legislature could read into our constitutional right of access those limitations inferred by the Second Circuit in its construction of FOIL.

C. IF ADOPTED, SKINNER'S ARGUMENT WOULD DECIMATE FLORIDA PUBLIC RECORDS LAW.

Under Skinner's view of copyright in public records, virtually every public record made by officials, employees, and agents of the State of Florida would be protected by copyright. Thus, in the uncontrolled discretion of thousands of public officials around the state, citizens could be barred from obtaining copies unless they agreed to sign licenses controlling, and exacting fees for, subsequent use of copies. Granting Skinner his wish would turn Florida public records law on its head. As the facts of this case show, the exaction of a copyright license as a condition to access cannot be reconciled with settled public records law of Florida.

In Florida, a custodian of public records may not impose conditions on the requester other than those necessary for the preservation and protection of the records. *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984). A custodian may not require a citizen to conform her request to any formality, to justify or explain the reason for demanding access, or even to identify herself. *See generally Tedesco v. State*, 807 So. 2d 804, 806 (4th DCA 2002) (holding that "[t]here is no requirement that any person show a 'need' in order to obtain public records"); *Curry v. State*, 811 So. 2d 736, 741-42 (Fla. 4th DCA 2002) (holding that repeated requests for public records cannot be construed as "stalking" because "[a] citizen's request for public records also involves a 'legitimate purpose,' because the right to obtain the records is established by statute and acknowledged in the state constitution. . . . The motivation of the person seeking the records does not impact the person's right to see them under the Public Records Act"); *Staton v. McMillan*, 597 So. 2d 940, 941 (Fla. 1st DCA 1992) (holding that the state must give prisoner records of his prosecution because he "made proper requests for access which may be effectuated in accordance with [the public records law] and his reasons for seeking such access are immaterial"); *Bevan v. Wanicka*, 505 So. 2d 1116 (Fla. 2nd DCA 1987) (holding production of public records may not be conditioned upon a requirement that the person seeking inspection disclose background information about himself or herself); *News-Press Publishing Co. v. Gadd*, 388 So. 2d 276, 278 (Fla. 2nd DCA 1980) (quashing deposition to inquire into motive for seeking access "[b]ecause the newspaper's motives . . . are irrelevant in an action to compel compliance with the Public Records Act"); *Warden v. Bennett*, 340

So. 2d 977 (Fla. 2nd DCA 1976) (holding intended use of records irrelevant to right of access).

Additionally, by statute, the custodian may only rarely charge for providing access for inspection, (Op. Fla. Att'y Gen. 2000-11), and may charge only the actual cost of duplication of records. FLA. STAT. ch. 119.07(4) (2002).[7] *See Southpointe* at 1382. *See also* Op. Fla. Att'y Gen. 1985-3 (explaining that "[t]he provision of access to public records is a statutory duty imposed by the Legislature upon all records custodians and should not generally be considered a revenue-generating operation. . . ."). If Florida state officials were permitted to assert copyright against public records requests, a conflict would arise (as it did here) regarding the license fees that officials could charge for their copyright licenses and the fee that they are permitted to charge under the public records statute.

D. FLORIDA'S HISTORIC LEGAL TRADITION REGARDS THE PUBLIC RECORDS OF THE STATE AS COMMON PROPERTY.

The conclusion that Florida has abrogated the copyright in its public records need not rest solely on the ample force of the self-executing constitutional right to copy. It traces into this constitution through the unbroken history of Florida's public records law.

In construing FOIL, the Second Circuit was influenced by the fact that the New York Attorney General

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[7] "The custodian of public records shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law. If a fee is not prescribed by law, the following fees are authorized . . . the actual cost of duplication of the public record." FLA. STAT. ch. 119.07(4) (2002).

already had recognized that agencies could enforce copyrights in their works at the time FOIL was enacted and FOIL said nothing to the contrary. *Suffolk County*, at 189 (citing Op. N.Y. Att'y Gen., 1973 WL 20304 (1973)). In light of what it called that "baseline," the court said, FOIL's silence on the subject was "deafening." *Id.* Quite the opposite is true of Florida's public records law.

Florida's unique[8] tradition of open government is rooted in the Progressive Era's preoccupation with the interests of the common man and in distrust of government. Our first public records law was adopted in 1892 in the early stages of that era. This statute provided with respect to the records of the clerk that:

> Such records shall be always open to the public, under the supervision of the clerk, for the purpose of inspection thereof, and of making extracts therefrom; but the clerk shall not be required to perform any service in connection with such inspection or making of extracts without payment of the compensation fixed by law.

Id. (*quoted in State ex rel. Davis v. McMillan*, 38 So. 666, 667 (Fla. 1905)) ("*Davis*").

In 1905, this statute became the subject of the first case in the Florida Supreme Court involving the public

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[8] *See* DAVID R. COLBURN & LANCE DEHAVEN SMITH, GOVERNMENT IN THE SUNSHINE STATE: FLORIDA SINCE STATEHOOD 4 (1999) (noting that Florida has been "distinctive" in its approach to "Government in the Sunshine"); ROBERT J. HUCKSHORN, INTRODUCTION TO GOVERNMENT AND POLITICS IN FLORIDA 1, 7 (Robert J. Huckshorn, ed., 2d ed. 1998) ("Florida invented the concept of sunshine laws that require public officials to hold meetings in the open so that the public and the press may attend. The laws also opened all public documents and papers to public inspection.").

right of access to public records. The clerk of court in Escambia County fought against the right of access of a private company engaged in the business of purveying abstracts of title for profit. Like Skinner, the clerk argued that he had the "right to exclude the [abstractors] from examination of the records, and from making extracts therefrom, unless such [abstractors] shall pay him a large amount as his fees and remuneration for such inspection and extracting." *Id.* at 667. The Florida Supreme Court rejected that contention.

Construing this historic statute, the Florida Supreme Court said "Our statute imposes no . . . condition or limitation, but its language in the broadest terms declares that such records shall be always open, not to those members of the public only who may be presently or prospectively interested in some particular matter contained in such records, but 'to the public.'" *Id.* Moreover, the Court continued by recognizing that the public records of Florida are the common property of the people because it could conceive of no reason that would:

> warrant the exclusion of the person engaged in the lawful and highly useful enterprise of compiling an abbreviated abstract of the titles to all the different pieces of real estate in a county, aggregating therein in condensed and convenient form all the matter from all of such records that affects each individual parcel of such real estate. Such abstracts are great time and money savers to the public generally, and are at times quite remunerative to the compilers and owners thereof. . . .

Id.

In *State ex rel. Harris v. Wiecking*, 61 So. 125 (Fla. 1913), the Court underscored that public records are common property by holding that *Davis* is not limited to the contents of the Official Records Book. Rejecting a distinction attempted by the Pinellas clerk, the Court said that "an instrument becomes a part of the public records from the time it is filed with the clerk for record, it, from that time, becomes open to the public for inspection and to take extracts from, just as much so as though it were spread at length upon the record books kept by such clerk." *Id.*[9]

Under *Davis*, therefore, the public records of Florida belong "to the public" and not to the government. Thus, the public records are common property. It is not merely permissible, but laudable, that private businesses use this common property to create commercially valuable products which "are great time and money savers to the public generally, and are at times quite remunerative to the compilers and owners thereof." *Davis*, at 667. Like the early abstractors, MicroDecisions and other such businesses compile, add value, and purvey information from the corpus of public property lodged in the public records.

Although the common property doctrine of *Davis* has ancient roots, there is no doubt that it lives and thrives today. In *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores*, 718 So. 2d 227 (Fla. 3rd DCA 1998), the court required Barnes & Noble, which it found to be

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[9] The 1892 statute applied only to clerks of courts, but in 1909 the legislature adopted the general public records law that is the direct predecessor of Chapter 119 today.

acting on behalf of the government,[10] to provide copies of certain records to its competitor. *Id.* at 229.

The case arose because Barnes & Noble acted as the college bookstore under contract with two state universities. *Id.* at 228. The instructors gave Barnes & Noble lists of required texts for the upcoming semesters so the store could stock these books for sale to students and instructors. *Id.* Booksmart, an off-campus competitor, requested copies of the completed forms from Barnes & Noble so that it too could stock the books and compete for student business. *Id.* Rejecting arguments based on the intended competitive use of the records, the court said that because the records were public records, "Barnes & Noble cannot deny anyone access to the completed forms." *Id.* at 229.

E. *DAVIS* IS THE "BASELINE" OF THE CONSTITUTIONAL RIGHT TO COPY.

Davis is part of the unbroken legal tradition that the people of Florida absorbed into their constitutional right of access. Whereas the Court in *Suffolk County* found significance in the fact that the New York Attorney General had created a "baseline" that permitted agencies to enforce copyrights before the 1977 passage of FOIL, the "baseline" of Florida's century old tradition of public access to public records is exactly to the contrary. Since 1905, *Davis* has never been questioned. It is the baseline that requires Florida courts to respect the public right to copy public records unfettered. Contrary, thus, to the Second Circuit's interpretation of FOIL, Florida public records law does

[10] *See* FLA. STAT. ch. §119.011(2) (2002) (private entity acting on behalf of government is agency for public records purposes).

concern itself with subsequent distribution of public records, and it always has.

CONCLUSION

Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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No. 05-383

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In The

Supreme Court of the United States

ABE SKINNER,

Petitioner,

v.

MICRODECISIONS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Appeal Of Florida, Second District

REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

Responding to the Brief in Opposition is made immeasurably more difficult because it addresses a question not presented to the Court. The *only* question before the Court is, "Whether a state court has jurisdiction to decide whether a person who has a copyright registration issued by the United States Copyright Office is entitled to the protection afforded by that copyright." Respondent argues the public policy of its claim to the unfettered "right" to profit from reselling the maps of Collier County without reimbursing the taxpayers for a portion of the costs incurred to create those records, and discusses Florida's long tradition of open records, rather than addressing the question of whether the state appellate court ever had jurisdiction to decide the copyright issue. Congress has specifically negated that jurisdiction. 28 U.S.C. § 1338(a).[1] A state appellate court has now decided who may not claim entitlement to copyright protection, a substantive right created by the Copyright Act. *MicroDecisions, Inc. v. Skinner*, 889 So.2d 871, 874 (Fla. 2nd DCA 2004).

I. The Question Presented Is Important and Unsettled.

MicroDecisions does not dispute that its only grievance was the records that it received were copyrighted.

[1] "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. *Such jurisdiction shall be exclusive of the courts of the states in* patent, plant variety protection and *copyright cases*." (emphasis supplied) The Collier County circuit judge correctly found he lacked jurisdiction to determine the copyright issue raised by Respondent.

The only reason this case was brought was to rid the records of the copyright so that Respondent could sell GIS tax maps back to the very taxpayers who paid to create them in the first place. So, under the guise of seeking access to public records already in its possession, Respondent set out to invalidate a Certificate of Registration from the U.S. Copyright Office in a Florida state court.

The Copyright Office's grant of copyright protection, evidenced by the Certificate of Registration, is *prima facie* evidence of the validity of the copyright. 17 U.S.C. § 410(c); *Donald Frederick Evans v. Continental Homes, Inc.*, 785 F.2d 897, 903 (11th Cir. 1986). Florida's Second District Court of Appeal stands this rationale on its head, leaving the decision of whether or not a valid copyright exists up to state courts, based on a contrived and baseless claim of denial of access to public records. Respondent already possessed the subject records when the Complaint was served. Respondent's grievance is that it was not free to sell the records that it received, a right that is not guaranteed by the Florida public records law, which only guarantees access to and the right to copy records.

Respondent had to turn this into a public records case because the copyright issue has been settled in the federal courts, adversely to its position. See *County of Suffolk, New York v. First American Real Estate Solutions*, 261 F.3d 179 (2nd Cir. 2001) ("*First American*").

A. Respondent Misinterprets Applicable Law.

The Second District Court of Appeal specifically held that Petitioner lacked authority to claim copyright protection. *MicroDecisions,* 889 So.2d at 874. In so doing, the Second District clearly exceeded the limits of its jurisdiction. Respondents do not cite or discuss this actual holding

in the case, and with good reason. This is not a case about whether a writing is entitled to copyright protection, as has been addressed by one state court. See *Wisconsin v. Law Office Information Services,* 603 N.W.2d 748 (Table), 1999 WL 649235 (Wis. App. 1999) (unreported), *cited* in Brief in Opposition, pages 4, 11, fn. 1. As the Wisconsin court noted in that case, "[t]he existence of a copyright is a matter of federal law. LOIS cites no federal statute or case law that makes these state statutes relevant to whether a copyright exists. Therefore, we reject this argument as a basis for deciding the copyright issue." *Id.* The court decided the case on the basis of statutory interpretation and contract law, and did not invalidate a copyright in the process. *Id.* The present reported case goes to the heart of copyright law: what court may answer the question of who may and may not claim entitlement to copyright protection.

Contrary to Respondent's assertions at page 3 of the Brief in Opposition, many Florida public officials and agencies routinely copyright works that fit the definition of public records, without specific statutory authority to do so. Even the Second District Court of Appeal that decided this case copyrights its own web page on the Internet.[2] Due to the fact that no entrepreneurs have found a way to make money by selling copies of that web page, that particular claim of copyright has not yet been judicially tested.

State law does not govern application of federal copyright law. "[F]ederal statutes are generally intended to have uniform nationwide application." *Mississippi Band*

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[2] See http://www.2dca.org.

of Choctaw Indians v. Holyfield, 490 U.S. 30, 43, 109 S.Ct. 1597, 1605, 104 L.Ed.2d 29 (1989). "We start . . . with the general assumption that 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Choctaw Indians,* 490 U.S. at 43, 109 S.Ct. at 1605 (citations omitted). "Accordingly, the cases in which we have found that Congress intended a state-law definition of a statutory term have often been those where uniformity clearly was not intended." *Choctaw Indians,* 490 U.S. at 1606, 109 S.Ct. at 44, *referencing Reconstruction Finance Corporation v. Beaver County*, 328 U.S. 204, 209, 66 S.Ct. 992, 995, 90 L.Ed. 1172 (1946) (statute permitting states to apply their diverse local tax laws to real property of certain Government corporations).

This Court applies this rationale to copyright cases. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989) ("*CCNV*"). *CCNV* began as a dispute between an artist and the organization that hired him, over ownership of a copyright for a sculpture. The case turned on the work for hire doctrine, and whether the artist was an independent contractor or an employee. Settling the issue of whether states control issues of federal copyright law, this Court noted, "[e]stablishment of a federal rule of agency, rather than reliance on state agency law, is particularly appropriate here given the act's express objective of creating national, uniform copyright law by broadly pre-empting state statutory and common-law copyright regulation." *Id. citing* 17 U.S.C. § 301(a). Section 301 explicitly preempts all claims that are covered under § 106 of the Act, if they come within the subject matter of §§ 102 and 103. Respondent would overturn this Court's ruling by allowing

differing results for the artist in *CCNV*, depending on whether he was located in Florida or in New York, based on state law. This is precisely what section 301 of the Copyright Act sought to avoid. See also *Storer Cable Communications v. City of Montgomery*, 806 F.Supp. 1518, 1536 (M.D. Ala. 1992) (noting that "local authorities, under the guise of trade regulation, cannot enact laws which go beyond the restriction of anti-competitive practices and target and extinguish one or more of the exclusive rights granted under § 106. . . . If this were not so, states could effectively extinguish copyright rights with their police power, a result which would surely frustrate the copyright scheme." (internal citation omitted)).

B. Respondent Avoids the Policy Behind the Copyright Act.

"Section 301(a) of the Copyright Act accomplishes the general federal policy of creating a uniform method for protecting and enforcing certain rights in intellectual property by preempting other claims." *Daboub v. Gibbons*, 42 F.3d 285, 288 (5th Cir. 1995). This policy is made crystal clear by the Notes of Committee on the Judiciary, House Report No. 94-1476, discussing section 301(a) of the Copyright Act and its promotion of uniformity of application rather than willy nilly application according to the whims of various state courts.

Daboub, supra, puts this policy into practice, and is analogous to the present case. In *Daboub*, a musical group, "the Nightcaps" sought to bring what was essentially a copyright infringement case against the musical group "ZZ Top," couching their claim in terms of tort. *Id.* at 287. The Nightcaps recorded, released, and performed a song in the

1950's, but never applied for a copyright. In 1975, ZZ Top released a version of the same song that it admitted was lyrically and musically identical, and copyrighted the song. The Nightcaps' action is analogous to Respondent couching its claims in terms of public records law, seeking to invalidate Petitioner's copyright certificate. As the Fifth Circuit noted: "The Nightcaps sing a chorus of state and federal law theories in their attempt to escape the grasp of the Copyright Act's preemption provision, 17 U.S.C. § 301(a). The Copyright Act expressly preempts all causes of action falling within its scope, with few exceptions." *Id.*

The determination of whether a cause of action is preempted under section 301(a) is made via a two-part test. *Id.* at 289. "First, the cause of action is examined to determine if it falls within the subject matter of copyright." *Id.* "Second, the cause of action is examined to determine if it protects rights that are 'equivalent' to any of the exclusive rights of a federal copyright, as provided in 17 U.S.C. § 106." *Id.* The focus in *Daboub* was on the "equivalency" determination. The Nightcaps argued that the state law conversion claims were not equivalent to a cause of action sounding in copyright. The Fifth Circuit noted that "[t]he core of each of these state law theories of recovery in this case, without detailing the specific elements comprising each claim, is the same: the wrongful copying, distribution, and performance of the lyrics of [the song]." *Id.* The Fifth Circuit roundly denounced the Nightcaps' attempt to circumvent the Copyright Act, noting: "In effect, the Nightcaps have attempted to avoid the Copyright Act by presenting as many state law causes of action to the court as possible. The Nightcaps' argument is like a ventriloquist's attempt to present a copyright action in the voice of state law claims. However, if the language of the

act could be so easily circumvented, the preemption provision would be useless, and the policies behind a uniform Copyright statute would be silenced." *Id.* at 290.

The same holds true with the present case. Despite having couched the Complaint as a writ of mandamus seeking to compel production of public records, Respondent's sole grievance is that Petitioner holds a Certificate of Copyright for the records it received, and Respondent claimed that because it could not copy, resell, copy, resell *ad infinitum*, that it was denied access to the public records already in its possession. The right to copy is one of the rights enumerated in section 106 of the Copyright Act. The only substantive remedy Respondent sought was a declaration that Petitioner could not, as a matter of Florida law, hold a Certificate of Copyright, a right granted by the Copyright Act. Just as the Nightcaps did, Respondent attempts an end-run around section 301(a) of the Copyright Act by claiming that this is a public records case.

Respondent would no doubt prefer that there be no preemption provision in the Copyright Act. The fact remains that section 301 bars state law claims about subject matter within the general scope of copyright that are equivalent to copyright claims. In this case, the subject matter at issue is ownership of the copyright itself, a right directly provided by the Copyright Act, not an equivalent right. Nevertheless, the Second District Court of Appeal maintained jurisdiction and held that the Petitioner was not entitled to claim copyright protection. Preemption certainly does apply to this case.

II. A Genuine and Acknowledged Conflict Exists Between Florida State Courts and the Second Circuit.

One of the fundamental purposes behind the copyright clause of the Constitution, as shown in Madison's comments in *The Federalist*, was to promote national uniformity and to avoid the practical difficulties of determining and enforcing an author's rights under the differing laws and in the separate courts of the various States. Today, when the methods for dissemination of an author's work are incomparably broader and faster than they were in 1789, national uniformity in copyright protection is even more essential than it was then to carry out the constitutional intent. Notes of Committee on the Judiciary, House Report No. 94-1476. If it is allowed to stand, the decision of Florida's Second District Court of Appeal renouncing the holding of the Second Circuit in *First American* will result in an author finding differing copyright protection depending on whether he created his work in Florida or New York.

Respondent's assertion that Florida's tradition of access to public records is older, more robust and more expansive than the Second Circuit's view of New York's Public Records Law ("FOIL") is akin to Ko-Ko's assertion in *The Mikado* about the flowers that bloom in the spring, tra la. Both have nothing to do with the case. Just because the Second Circuit declined to engage in legislating from the bench by adding the right to sell records to a statute that did not contain such a right does not mean that the Second Circuit applied a narrow standard.

New York's FOIL is as broad as Florida's public records law. "The Freedom of Information Law makes government records presumptively available to the public without regard to the status, need, good faith or purpose of

the applicant." *Matter of Scott, Sardano & Pomeranz v. Records Access*, 65 N.Y.2d 294, 296, 491 N.Y.S.2d 289, 480 N.E.2d 1071 (1985); *Matter of Farbman v. New York City Health & Hospitals Corp.*, 62 N.Y.2d 75, 80, 476 N.Y.S.2d 69, 464 N.E.2d 437 (1984). "A general public interest in disclosure need not be demonstrated and access to government records in aid of litigation, both against the government and against other individuals, frequently has been directed by the courts." *Journal Publishing Company v. Office of the Special Prosecutor*, 131 Misc.2d 417, 420, 500 N.Y.S.2d 919 (1986). **"In short, FOIL gives a sweeping right to public records and only narrow grounds for resisting disclosure."** *Id.* (Emphasis added.) See also *Lorei v. Smith*, 464 So.2d 1330, 1332 (Fla. 2nd DCA 1985), *review denied*, 475 So.2d 695 (Fla. 1985) (recognizing that the "breadth of such right [of access] is virtually unfettered, save for the statutory exemptions"). Application of FOIL by New York courts is no less broad than by Florida Courts. *Cf. Booksmart Enterprises v. Barnes & Noble*, 718 So.2d 227 (Fla. 3rd DCA 1998) and *In the Matter of Mohawk Book Company, Ltd. v. State University of New York, et al.*, 288 A.D.2d 574, 732 N.Y.S.2d 272 (3 Dept. 2001) (both state courts determining that university course syllabi were indeed public records, and must therefore be disclosed).

The sole difference between *First American* and *MicroDecisions* is not the public records laws of the two states, which guarantee precisely the same rights, but the resulting decision as applied to the rights involved under the Copyright Act. Such an incongruous result surely does not square with the intent of the Copyright Act. The Second District reaches such a result by eagerly embracing the Respondent's suggestion that the New York Public Records Law that purportedly controlled *First American* is not the same as Florida's Public Records Law, despite the

fact that they both guarantee the same rights to inspect and copy records, but not to sell them. See *MicroDecisions*, 889 So.2d at 876. The conflict is clear and admitted, though the Second District misconstrued whether federal or state law controlled the case: "New York law is not Florida law." *Id.* This Court needs to resolve this dichotomy.

III. Petitioner's Interpretation Will Not Eviscerate Florida's Public Records Laws.

Contrary to Respondent's Chicken Little-esque claims that the Petitioner's interpretation of Florida's public records law will be the death knell for access to public records in the State of Florida, the opposite is true. It is uncontroverted that Petitioner has always provided one copy of any public record, including the GIS records in question here, upon payment of the fee prescribed by law, exactly as required under Chapter 119, Florida Statutes. Floridians' rights of access to public records stand to be damaged more by having to pay exorbitant subscription fees to entrepreneurs such as Respondent in order to view records than by viewing them on Petitioner's website for free or receiving a copy from the Petitioner for the actual cost of reproduction as provided under Florida's public records law.

Respectfully submitted,

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